

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

STATE FARM FIRE AND	:	CIVIL ACTION
CASUALTY COMPANY	:	
	:	
v.	:	
	:	
JULIAN COLBERT, a minor, by	:	
DARIAN COLBERT, his parent and natural	:	
guardian; DARIAN COLBERT individually;	:	
JOSHUA BOBO, JULIE BOBO, and	:	
LISA WESTGATE	:	NO. 06-1827

ORDER AND OPINION

JACOB P. HART
UNITED STATES MAGISTRATE JUDGE

DATE: December 12, 2006

In this action, State Farm Fire and Casualty Company (State Farm) seeks a determination of its coverage responsibilities under a homeowner's policy held by defendant Julie Bobo with respect to an incident allegedly caused by Joshua Bobo, in which Julian Colbert was injured. The defendants have filed a motion for summary judgment seeking a determination that coverage exists. For the reasons that follow, I will grant the defendants' motion.

I. Factual and Procedural Background

A. The Accident

Defendant Julian Colbert is a minor who is the natural child of Darian Colbert and Julie Bobo. He was nine years old at the time of the September 21, 2003, accident at issue in this case. Deposition Testimony of Julie Bobo, attached as Exhibit 5 to Defendants' Motion, at 5. His parents lived separately since he was two years old. *Id.* at 25.

According to both of his parents, as well as Julie Bobo's mother, Lisa Westgate, Julian moved in with his father and a stepmother when he was six years old. Id. at 8-9; Deposition Testimony of Lisa Westgate, attached as Exhibit 6 to Defendants' Motion at 6; Deposition Testimony of Darian Colbert, attached as Exhibit 10 to Defendants' Motion, at 11: "Julian came to live with us when he was six years old and he's with us since full-time."

The parties did not enter a formal custody arrangement. Nevertheless, by mutual agreement, Julian saw his mother approximately once a week, and would occasionally sleep overnight at her house – roughly once per month. Testimony of Julie Bobo at 10, 12, 20, 30; Testimony of Lisa Westgate at 6-7; Testimony of Darian Colbert at 10-13.

On the date of the accident, Julian was at the house Julie Bobo co-owned and shared with her mother, Lisa Westgate. Julie Bobo was at work at the time of the accident, but Ms. Westgate was at home. Testimony of Julie Bobo at 13,18; Testimony of Lisa Westgate at 10-11; Testimony of Julian Colbert at 13.

Also in the house was Joshua Bobo, Julie Bobo's brother. Testimony of Lisa Westgate at 10-11; Testimony of Julian Colbert at 13; Testimony of Joshua Bobo, attached as Exhibit 8 to Defendants' Motion, at 18. According to the defendants, Joshua Bobo had been sleeping at the house for several weeks at that time, having been evicted by his then-girlfriend, Kristin Reese. Testimony of Joshua Bobo at 1, 6-8; Testimony of Julie Bobo at 27; Testimony of Lisa Westgate at 8-9, 22. He brought to the house a number of bags of his personal belongings. Testimony of Joshua Bobo at 9; Testimony of Lisa Westgate at 22. Included in one of these bags was at least one powerful firework, possibly an M-80. Testimony of Joshua Bobo at 15.

Julian, who was playing with a friend in the room where Joshua Bobo was staying, lit one of his uncle's fireworks. Testimony of Julian Colbert at 17, 20-23. When it exploded in his left hand, he sustained severe injuries to the hand, requiring the amputation of most of his fingers. Complaint in Colbert v. Bobo, No. 2005-C-2535 (C.C.P. Lehigh Cty.), attached as Exhibit B to State Farm's Complaint.

Julian and his father, Darian Colbert, filed a negligence action in the Court of Common Pleas for Lehigh County, naming as defendants Joshua Bobo, Julie Bobo and Lisa Westgate. See Colbert v. Bobo complaint, supra. State Farm subsequently filed this declaratory judgment action.

B. The State Farm Policy

The homeowner's insurance policy issued to Julie Bobo extends liability coverage to an insured "if a claim is made or a suit is brought against an **insured** for damages because of bodily injury or property damage to which this coverage applies, caused by an occurrence." Policy, attached as Exhibit A to State Farm's Complaint, at Policy Section II, Coverage L – Personal Liability, page 15. (Bold in original; other emphasis omitted).

An "insured" is defined as "you and, if residents of your household: (a) your relatives; and (b) any other person under the age of 21 who is in the care of a person described above." In this action, State Farm maintains that Joshua Bobo, Julie's brother, does not fall under this definition because he was not a resident of her household. Id. at 1. Defendants, however, argue in their motion for summary judgment that Joshua Bobo was a resident.

Moreover, the policy contains this exclusion: "Coverage L [Personal Liability, as above] ... do[es] not apply to ... you or any **insured** within the meaning of part a. or b. of the definition

of insured.” Id. at 16-17, ¶ h. Therefore, the second issue in the motion for summary judgment is whether Julian Colbert was a resident of his mother’s house. If he was, then he was an “insured,” and, under Exclusion h, State Farm need not provide any coverage with respect to his accident. In their motion for summary judgment, Defendants maintain that Julian was not a resident of that house.

II. Legal Standards

A. Summary Judgment

Summary judgment is warranted where the pleadings and discovery, as well as any affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. Pr. 56. The moving party has the burden of demonstrating the absence of any genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). In response, the non-moving party must adduce more than a mere scintilla of evidence in its favor, and cannot simply reassert factually unsupported allegations contained in its pleadings. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986); Celotex Corp. v. Catrett, supra at 325; Williams v. Borough of West Chester, 891 F.2d 458, 460 (3d Cir. 1989).

When ruling on a summary judgment motion, the court must construe the evidence and any reasonable inferences drawn from it in favor of the non-moving party. Anderson v. Liberty Lobby, supra at 255; Tiggs Corp. v. Dow Corning Corp., 822 F.2d 358 , 361 (3d Cir. 1987). Nevertheless, Rule 56 “mandates the entry of summary judgment ... against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” Celotex Corp. v. Catrett, supra, at 323.

B. The Concept of “Residence” In An Insurance Case

Construction of the term “resident” in the policy is a matter of law. Nationwide Mutual Insurance Company v. Budd-Baldwin, 947 F.2d 1098, 1100 (3d Cir. 1991); Schultz v. Encompass Insurance, Civ. A. No. 03-3936, 2004 WL 2075114 at *3 (E.D. Pa. Sep. 16, 2004). Clearly, however, summary judgment on the issue of residency can be granted only if there is no issue of material fact in dispute. Budd-Baldwin, supra. In cases such as this, where an insurance policy does not define “resident,” or include words of refinement, the term is held to refer to its common law definition. Id. at 1102.

Under Pennsylvania case law, residence is not an issue of intention, but one of physical fact and presence. Budd-Baldwin at 1102, citing Amica Mutual Ins. Co. v. Donegal Mutual Ins. Co., 545 A.2d 343, 346-7 (Pa. Super. 1988); see also Schultz, supra, also citing Amica. As opposed to domicile, which incorporates an element of intent, residence is “the factual place of abode”, requiring “only physical presence.” Budd-Baldwin, citing Krager v. Foremost Insurance Co., 450 A.2d 736 (Pa. Super. 1982).

As a result of this, the Pennsylvania Superior Court has written: “The fact that a child’s parents live in separate households should not automatically render him a resident of both if, as a matter of physical fact, he lives at one and spends no significant time at the other.” Amica, supra, at 348.

III. Discussion

A. Julian Colbert's Residence

The unrefuted evidence shows that there is no real issue of fact as to whether Julian Colbert resided with his mother. He did not. State Farm has pointed to Miller & USF&G, 28 Pa. D&C 3d 389 (C.C.P. 1983) as indicating that a minor child of divorced parents can be a resident of both parents' households, even in the absence of a formal custody agreement. Although this may be true, the facts do not support such a finding here.

Under Budd-Baldwin and the state cases it cites, Julian's physical presence is crucial to determining his residence. It is undisputed that he spent almost every night since he was six years old in his father's household. Even when Julian spent the occasional night at his mother's house, he and his mother had to seek permission from Damian Colbert:

QUESTION: Julian said that there were occasions when he did stay overnight [with Julie Bobo].

DARIAN COLBERT: Yes, sir.

Q: Why would he at times stay overnight?

A: He would call and say – it would be 8:30, 9 o'clock – and he would say – . Or actually his mother would call and say is it all right if Julian spends the night and I would say yes.

Q: Okay. But on those occasions when Julian would stay over with his mother, were those occasions – did those occasions occur based on permission from you?

A: Yes, sir.

Q: In other words he wouldn't stay over without Julie first calling you and saying Darian, is it okay if Julian stays over at my house tonight, is that correct?

A: Yes, sir.

Testimony of Darian Colbert at 12; see also Testimony of Julie Bobo at 20; Testimony of Julian Colbert at 9: (“Sometimes we just called and asked my dad if I could sleep there”). State Farm has not refuted this testimony as to the visitation arrangements.

Moreover, Defendants have provided a copy of a School Registration Form showing that Julian attended school in Allentown, where his father lived, and not in the Whitehall School District, where his mother lived. Student Registration Form, attached as Exhibit 3 to Defendants’ Motion; and see Testimony of Julie Bobo at 30; Testimony of Julian Colbert at 33. On the Allentown School Registration Form, Darian Colbert is listed as the “person with whom child resides.” Id. Darian Colbert and his wife, Yolanda Colbert, are listed as Julian’s first two parents. Id. Julie Bobo’s name appears underneath theirs. Id.

Defendants have also attached to their motion Darian Colbert’s tax return for the year 2003. Tax Return, attached as Exhibit 2 to Defendants’ Motion. In it, he named Julian Colbert as a dependent. Id.

State Farm has pointed out in its response that Julian kept some clothes, a dirt bike, and some other possessions at his mother’s house, including: “a couple of video games .. skates, basketball maybe or football.” Testimony of Julie Bobo at 28. This, however, is not determinative. In Amica, the Pennsylvania Superior Court affirmed a lower court’s finding that a high-school aged minor did not live with her father because she spent only “three to five” nights a month at his house. 545 A.2d at 345. This was despite the fact that she kept “a closet or two full of clothes” and approximately forty pairs of shoes at her father’s house, and even kept a pet rabbit there. Id.

The Amica court wrote: “We do not find erroneous the [lower] court’s holding that the personal items which Elizabeth kept at her father’s house at the time she lived with her mother were for convenience and did not evidence that she physically lived there.” Id. at 346.

In short, it is clear from the evidence that, as a matter of physical fact (as the Amica court has phrased it), Julian lived with his father and only visited his mother. For this reason, I will grant the defendants’ motion in this regard, and find that Julian Colbert was not a resident of Julie Bobo’s household on the date of the underlying incident in this case.

B. Joshua Bobo’s Residence

Under the applicable law, it is also apparent that Joshua Bobo was a resident of Julie Bobo’s house on the day of the incident. Whatever Joshua Bobo’s intent regarding the length of his stay there, Julie Bobo’s house was his “factual place of abode” at that time. See Budd-Baldwin, *supra*, and Krager v. Foremost Insurance Co., *supra*.

This is a slightly more complicated inquiry than that regarding Julian Colbert, because Joshua Bobo had a more complicated life. As State Farm points out, Joshua Bobo left a large quantity of furniture at Kristin Reese’s house when he left, as well as some tools. Testimony of Joshua Bobo at 9. It is also true that he went back to live with Kristin Reese for up to two weeks after Julian’s accident. Id. at 9-10.

Further, Joshua Bobo used a number of addresses for official purposes. The report of private detectives retained by State Farm states that on September 12, 2003, during the time he claimed to be living with his sister, Joshua Bobo listed his address as 2008 Columbia Street, Allentown, where his grandmother lived. Report of Egis International Inc., Private Detectives, attached as Exhibit C to State Farm’s Response, at 1-2. The report also states that a “credit

header information” database investigation showed that Joshua Bobo used four different addresses “encompassing the date of September 21, 2003,” including his grandmother’s address, but *not* including either Julie Bobo’s or Reese’s addresses. Id. at 7. Reese’s address, however, was used for some purpose as late as February, 2004. Id.

Even disregarding the hearsay nature of the detectives’ report, however, the fact remains that State Farm has not successfully refuted the defendants’ claim that Joshua Bobo was physically located at Julie Bobo’s household at the relevant time. Joshua Bobo testified that he lived with his grandmother until he moved in with Reese, but that he did not return there when Reese put him out, because his grandmother “said it wouldn’t work out because of me coming in late.” Testimony of Joshua Bobo at 7. He testified that he had used his grandmother’s address as his mailing address for the “last twenty years, or forever”, beginning when he was eighteen or nineteen years old. Id. at 28-29.

Moreover, Kristin Reese, a non-party, testified at her deposition that Joshua Bobo went “to his mother’s house” after he left her house. Testimony of Kristin Reese Pujols, attached as Exhibit 9 to Defendants’ Motion, at 17. This would be the house Lisa Westgate shared with her daughter, Julie Bobo. Reese testified that she knew this to be true because “I would take my daughter there to see his mom, and that’s where he moved all his clothes to and set up a bedroom there.” Id.

It is also apparent that Joshua Bobo was not residing with Kristin Reese at the time of the accident, and simply visiting his mother and Julie. Both Joshua Bobo and Reese testified that her eviction of Bobo in early September was intended to be permanent. Testimony of Joshua Bobo at 6; Testimony of Kristin Reese Pujols at 10-11. Their testimony is substantiated by the fact –

undisputed by State Farm – that, on the day after Bobo left, Reese took “everything that he didn’t pack up the previous night and packed it in garbage bags and took it to his job.” Testimony of Kristin Reese Pujols at 11; Testimony of Joshua Bobo at 8-9.

That fact that Joshua Bobo left his furniture and tools at Reese’s house during that time does not detract from this conclusion. These were items that Bobo could not pack up and ride away with on his motorcycle. Moreover, Reese would have little motivation to return Bobo’s furniture, leaving “a completely empty house,” as eventually happened in February, 2004, when Bobo took the furniture one day when Reese was out. Testimony of Kristin Reese Pujols at 12.

I also find plausible the testimony that Bobo returned to Reese’s house for some nights after the accident only because he was “very distraught and needed comforting.” Record at 9. Also, Julie Bobo was furious with her brother: “I told him that he was no longer my brother, that he was dead to me.” Testimony of Julie Bobo at 16. When Bobo once again left Reese’s house, after a week or two, he lived at Julie’s house for another nine months. Testimony of Joshua Bobo at 11; Testimony of Kristin Reese Pujols at 33-34.

It is clear under the caselaw that Bobo’s (and Reese’s) plans were not crucial. In Schultz, supra, the Honorable Juan Sánchez has suggested that, under Amica, even a transitory physical presence confers residence. 2004 WL 2075114, *3. However, the testimony cited above strengthens the inference that Bobo’s stay at his sister’s house was no mere social visit.

Thus, despite Joshua Bobo’s unsettled lifestyle, I must conclude that there is no issue of material fact regarding where he resided on September 21, 2003. He was a resident at Julie Bobo’s household. For that reason, I will also grant this portion of the defendants’ motion for summary judgment.

In accordance with the above opinion, I now enter the following:

ORDER

AND NOW, this day of December, 2006, upon consideration of Defendants' Motion for Summary Judgment, filed in this case as Document No. 23, and Plaintiff's response thereto, it is hereby ORDERED that Defendants' motion is GRANTED, and the following factual determinations made:

(1) Julian Colbert was not a resident of his mother Julie Bobo's household at the time of the underlying incident on September 21, 2003, and, as a result, under the insurance policy at issue, State Farm does owe a duty to provide bodily injury coverage to Julian Colbert; and

(2) Joshua Bobo was a resident of Julie Bobo's household at the time of the underlying incident, and, as a result, under the insurance policy at issue, State Farm has an obligation to defend Joshua Bobo or to indemnify him for any claims being asserted against him by Julian Colbert.

BY THE COURT:

/s/Jacob P. Hart

JACOB P. HART
UNITED STATES MAGISTRATE JUDGE